Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

UNITED STATES EX REL. ABRAHAM GALE,

Petitioner,

v.

ZENITH DATA SYSTEMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The False Claims Act, first passed 1863, is the Government's most potent remedy against fraud. The *qui tam* provisions authorize suits by whistleblowers on behalf of the United States. After *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), construed the Act to allow *qui tam* actions based upon information in criminal indictments, Congress banned virtually all private suits. In 1986, Congress reinstated *qui tam* jurisdiction and substantially increased incentives and protection for whistleblowers, eliminated the "government knowledge" defense, and shifted the bar to suits based upon three types of publicly disclosed allegations of fraud [§ 3730(e)(4)(A)] unless the relator was the original source [§ 3730(e)(4)(B)] for at least some of the information [§ 3730(d)(1)] on which the allegations are based. The Ninth Circuit broadly extended the jurisdictional bar to preclude suits in which the whistleblower learns some of the information during a privileged conversation with an Assistant U.S. Attorney. Accordingly, the questions for review are:

1. Can a U.S. Attorney's private confidential privileged disclosure to a whistleblower during an ongoing investigation in a sealed case be a sufficiently public disclosure under 3730(e)(4)(A) to jurisdictionally bar the whistleblower's subsequent complaint?

2. If so, does the district court nevertheless have jurisdiction under 3730(e)(4)(B) because the whistleblower is an "original source" of the investigation leading to the complaint and/or some of the information on which it's allegations are based?

PARTIES TO THE PROCEEDINGS

Petitioner is the plaintiff and appellant below, Abraham Gale. He was Manager of the Computer Department at Packard Bell-NEC (PBNEC) that disassembled used computers, placing these "used" parts in the "new parts" inventory. He was terminated in December, 1994, for objecting to the fraudulent practice of charging the Government "new" prices for computers assembled from an inventory of mixed new and used parts. Gale received a 15% relator's share in his *qui tam* case against PBNEC. Gale is the plaintiff and appellant in the instant *qui tam* case against Zenith Data Systems, alleging that ZDS sold the Government computers containing used parts manufactured by PBNEC.

Zenith Data Systems (ZDS) is the respondent, the defendant and appellee in a second qui tam case filed by Gale. Zenith sold computers to the Government manufactured by Packard Bell-NEC (PBNEC) under an alliance agreement beginning in 1993, with ZDS holding 20% of PBNEC. ZDS became a wholly-owned subsidiary of PBNEC in April, 1996, and a division in 1997.

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OPINIONS BELOW

Petitioner Abraham Gale respectfully petitions for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit to review *Seal 1, Seal 2 v. Seal A*, Docket No. 98-56447, reported at 255 F.3d 1154 (9th Cir., July 5, 2001), and reproduced at App. A, 1a-17a. The unreported August 5, 1998 opinion of the United States District Court for the Central District of California dismissing the Complaint for lack of jurisdiction under 31 U.S.C. § 3730(e)(4) is reproduced at App. B, 18a-29a.

STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. § 1331. The Ninth Circuit entered its opinion and judgment on July 5, 2001, and denied a timely filed petition for rehearing and suggestion for rehearing en banc on September 18, 2001. App. C, 30a-31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS PETITION

The False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, authorized Gale's *qui tam* action against ZDS for defrauding the Government by overcharging it for used computers sold as new. The district court had subject matter jurisdiction over Gale's action because there was no pre-filing public disclosure of fraud allegations in at least one of three methods. Even if the Government's confidential privileged disclosure that it was initiating an investigation to see if PBNEC manufactured computers for ZDS containing used parts from Gale's department was sufficiently "public" to trigger the bar, the district court nevertheless retained jurisdiction because Gale was the "original source" for the investigation and for the critical fraud allegation in his ZDS complaint. This Court should resolve the circuit split concerning the scope and application of "public disclosure" and "original source." A correct interpretation of

these provisions is vitally important to the future of the FCA. The relevant provisions of the FCA are:

> §§ 3730. Civil actions for false claims
>
> * * *
>
> (d) Award to qui tam plaintiff.
>
> (1) * * * Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. * * *
>
> * * *
>
> (e) Certain actions barred.
>
> * * *
>
> (2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought. * * *
>
> (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or

an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

Relator Abraham Gale brought his first action under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq*. (FCA), against Packard Bell-NEC, Inc. (PBNEC) on April 7, 1995 in the Central District of California. The Complaint alleged that PB defrauded the Government by selling computers containing used parts for the price of totally new computers. For himself as relator and for the Government, Gale sought treble damages (difference in market price between the totally new computers and the discount price that should have been charged for used computers) and statutory forfeitures ($10,000 per false claim).

By March, 1996, a dispute had arisen between Gale and the U.S. Attorney's Office (USAO) over whether the PBNEC Complaint covered computers sold by PBNEC's sister company (and now subsidiary) Zenith Data Systems (ZDS). The district court ultimately ruled in Gale's favor that the PBNEC complaint

was not jurisdictionally barred by a prior public disclosure, and awarded Gale a 15% share of the $3.5 million settlement. Gale filed the ZDS Complaint at issue here on April 16, 1996 to ensure that any ZDS liability was effectively prosecuted and to protect his rights as a relator.

The USAO and Defendants claimed that the court lacked subject matter jurisdiction because fraud allegations had allegedly been publicly disclosed before Gale filed his ZDS Complaint. Gale countered by demonstrating that private privileged statements to him were not "public" so as to raise the jurisdictional bar, and in the alternative, he was an "original source" of the ZDS allegations because he provided the information that triggered the Government's investigation of ZDS and he had prior knowledge of the key fraud allegation in the ZDS complaint.

However, the court dismissed the ZDS Complaint based on a factual finding that Gale first learned of ZDS fraud allegations while reviewing PBNEC documents in the USAO and that he was not an "original source" of these allegations. The court also concluded as a matter of law that Gale's review of documents in the USAO was a public disclosure, and that there was not a sufficient nexus between the PBNEC and ZDS fraud allegations for Gale to remain a proper relator.

The Ninth Circuit affirmed. The panel improperly expanded the jurisdictional bar, substituting the repudiated "government investigation" defense for the statutory requirement of "public disclosure." The panel compounded its error by adopting an improperly narrow construction of the "original source" exception to the "public disclosure" jurisdictional bar, concluding that the district court lacked jurisdiction even though Gale initiated the investigation of PBNEC that led directly to the Government's inquiry into PBNEC manufacturing computers for ZDS and Gale was an "original source" of the core allegation in the ZDS complaint (PBNEC's comingling of used with new parts).

REASONS FOR GRANTING THE WRIT

Far worse than simply being wrong, and contrary to its own precedents, the Ninth Circuit's decision conflicts with the analytical framework set out in this Court's decision in *Marcus v. Hess*, conflicts with other circuits that have correctly analyzed the jurisdictional bar, and is an important case to the future of the FCA because it affords the Court the opportunity to clarify and simplify the jurisdictional analysis in this increasingly murky and convoluted area of the FCA, properly focussing not on what the Government "knows" but on what the relator brings to the case. The Ninth Circuit's faulty analysis so severely undermines the incentives for *qui tam* relators implemented by Congress in 1986 and so drastically increases the risks and uncertainty faced by relators that the future of the FCA as the most potent antifraud tool and deterrent is vitally at stake.

I. The Opinion Exacerbates a Growing Conflict Among the Circuits Over the Scope of a "Public" Disclosure and "Original Source."

A. Congress barred *qui tam* actions (unless brought by an original source) based upon disclosures in three specific and limited categories of public fora: (1) in a criminal, civil, or administrative hearing; (2) in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation; or (3) from the news media. Until now,[1] no

1. In *Hughes v. United States ex rel. Schumer*, 520 U.S. 939 (1997), this Court granted a writ of certiorari to review, *inter alia*, the Ninth Circuit's holding that a limited disclosure to Hughes' employees of a government fraud investigation was not sufficiently "public" to trigger the bar. Because the Court resolved the case by holding that the 1986 amendments could not be applied retroactively, it expressed no opinion on the Ninth Circuit's "public disclosure" analysis. *Id.* at 945. The public disclosure/original source jurisprudence is in a state of mass confusion, made much worse by the panel opinion. The simplicity of the facts in this case and the generality of the panel's expansive construction of the jurisdictional bar and crabbed construction of the "original source" exception make this case an ideal vehicle to resolve the mass confusion among the circuits.

court has ever construed "public" to include confidential communications between government counsel and a relator concerning an ongoing investigation of a sealed case. The confusion[2] among the panels and circuits is due in part to

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2. In *United States ex rel. Merena v. SmithKline Beecham Lab., Inc.*, 114 F. Supp. 2d 352, 371-72 (E.D. Pa. 2000), Judge VanArtsdalen urged this Court to clear up the confusion:

> The False Claims Act has spawned a great amount of litigation throughout the United States. There are serious disputes among and within the judicial circuits who have confronted the issues raised by the statute as to the proper interpretation of various clauses of the statute. . . . There seems to be no unanimity both among and within individual circuits as to when claims are "based upon" public disclosures, what constitutes a public disclosure, when and under what circumstances a qui tam relator must first inform the government of the claims, the extent of the factual information that must be provided to the government prior to filing the qui tam action, when a qui tam action must be filed where there has been a public disclosure, what are the requisites to be classified as an "original source," when a claim is "primarily based upon" prior public disclosures and many other issues that arise under the statute. These questions will continue to plague and perplex litigants and the courts. . . . No doubt the number of qui tam cases that will be filed under the False Claims Act will increase. Indeed, one of the principal purposes of the most recent amendments to the Act was to encourage meritorious qui tam actions. . . . *I also hope that the United States Supreme Court will take the first opportunity it has to review the several inter-circuit conflicts as to the law.*

(citations omitted; emphasis added). The author of one of the leading FCA treatises has also urged this Court to resolve the "sharp dispute between the circuits:"

> Some courts interpreting Section 3730(e)(4)(A) have held that the statute provides an exclusive list of ways in which a public disclosure must occur for the jurisdictional bar to

(Cont'd)

their failure to properly implement the intent of Congress to limit the bar to a "*public* disclosure of allegations or transactions." The word "public" has an unambiguous clearly understood definition:

> pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use.

Black's Law Dictionary Abridged 854 (6th ed. 1991).[3] The panel was not free to reject the ordinary meaning of "public disclosure" and redraft the jurisdictional bar more to its liking.

B. The panel's reasoning conflicts with other panels of the Ninth Circuit further illustrating the growing confusion over the proper analytical framework. A different panel held in *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992), that

(Cont'd)

> apply, although courts are divided as to definitions of terms in the list. Others have applied the bar expansively by broadly defining "public disclosure" and the list of disclosure sources provided in the statute. *This remains an area of sharp dispute between the circuits that must be resolved by the Supreme Court.*

Boese, Civil False Claims and Qui Tam Actions § 4.02[B] (Supp. 2001-2) (footnotes omitted; emphasis added); *id.* at § 4.02[D] ("Indeed, in a relatively short period, the "original source" rule has become (along with "public disclosure") *the most litigated–and confused–issue under the qui tam provisions*." (emphasis added)).

3. A plain and ordinary meaning of "public" is "open to general observation, sight, or cognition, . . . manifest, not concealed," 12 Oxford English Dictionary, 2d ed. 780 (1989). This Court has traditionally relied on common-sense dictionary definitions of words in construing the FCA. *U.S. ex rel. Fine v. Chevron, USA*, 72 F.3d 740, 744 & n.4 (9th Cir. 1995) (en banc) (dictionary definition of "voluntary"); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-20 (9th Cir. 1991) ("public disclosure").

disclosure during discovery in the *qui tam* suit was *not* a public disclosure *with respect to Wang*. Citing *Wang*, the panel explained in *U.S. ex rel. Barajas v. Northrop*, 5 F.3d 407, 411 (9th Cir. 1993) that:

> In this case, the deficiency in the damping fluid was not disclosed during civil discovery, but as a result of the government's criminal investigation, which in turn may have been based on information Barajas had provided to the government. . . . [T]here is no reason to draw a distinction between disclosure resulting from civil discovery by the government or a *qui tam* plaintiff, and disclosure resulting from a criminal investigation by the government based on information provided by a *qui tam* plaintiff. *Such a distinction would allow the government to limit the potential recovery of qui tam plaintiffs unfairly simply by initiating a criminal investigation, and would subvert Congress's desire to combat fraud by providing broad incentives for qui tam suits.*

5 F.3d at 411 (emphasis added). It cannot be fatal to Gale that he learned information from discovery conducted by the USAO as opposed to his own. If the public disclosure of the defective damping fluid in a criminal indictment is not "public" with respect to Barajas, then any privileged private confidential disclosures to Gale cannot possibly be "public" solely with respect to Gale.

Another panel held in *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 (9th Cir. 1997), that relator's knowledge, gleaned from his work with the Corps, was *not* a "public disclosure." Hagood could use non-public information he learned from his government employment to file his suit. *U.S. ex rel. Hagood v. Sonoma Water Agency*, 929 F.2d 1416, 1419-20 (9th Cir. 1991) ("The United States has neither case law nor legislative history to support its extraordinary reading of a remarkably explicit jurisdictional statute."). It is simply

impossible to reconcile what Hagood learned (making him a proper relator) with the panel's conclusion that Gale was barred because of what he learned. If a former government employee can use information he learned from the government, *and (unlike Gale) was under no duty to keep secret*, to file an FCA action, then there is no logic in barring Gale (who was under a duty to keep his information confidential).

Still another panel stated in *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997), that disclosure of audit reports to "innocent" employees was not public. "Under a 'practical, commonsense interpretation' of the jurisdictional provisions, information that was 'disclosed in private' has not been publicly disclosed." *Id.* at 1518. The *Schumer* panel went on to note that treating disclosures to "innocent" employees as public would undermine the key Congressional objective because:

> any employee who receives word of government allegations would be barred from bringing suit. Contrary to Congress's intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits. *Doe*, 960 F.2d at 326 (Walker, J., dissenting).

Id. at 1518-19. Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." *Id.*

The panel's attempt to distinguish Gale (public disclosure) from the employees in *Schumer* (private disclosure) cannot be reconciled with *Schumer's* approval of nonpublic disclosures to "strangers" to the fraud. Gale was not an "outsider" with

respect to the ZDS fraud. App. A. 13a-14a. It was the used parts from the department he managed (disassembling used and returned computers and commingling the used parts with the new inventory) that were ultimately used in the assembly of ZDS computers. Unlike Schumer, who was under no legal duty to keep quiet and did in fact profit by using information he learned from the government by filing his own *qui tam* suit, Gale, *arguendo*, learned about ZDS as part of the discovery process in his PBNEC *qui tam* suit, as part of a statutorily sealed[4] process that was private, privileged,[5] and confidential.[6] Contrary to the panel's assumption, App. A. 2a, 4a, 10a, 13a-14a, there was no separate "Zenith" investigation. The panel's limitation of the bar only to Gale, App. A. 14a, as opposed to the "public," demonstrates the circularity of its reasoning. If Gale is barred by the disclosure, as an outsider and member of the public, then so must be the public at large. The panel's construction of "public disclosure" to bar one member of the public at a time has no support in the text or legislative history and produces an absurd and untenable result. If, for example, discovery materials are not "public" until filed with the court, then it is impossible for confidential and privileged communications to Gale to be deemed "public" for purposes of the bar.

C. The panel's opinion expressly conflicts with cases from other circuits that require objective and affirmative acts of disclosure to the general public in the three listed fora to trigger

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4. *See, e.g., U.S. ex rel. Lujan v. Hughes*, 67 F.3d 242, 244 (9th Cir. 1995) (premature disclosure risks dismissal).

5. Any information learned by Gale could not possibly meet the "available to any member of the public" test because of the seal and the joint prosecution privilege. *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680 (S.D. Cal 1996).

6. The AUSAs assigned to work with Gale testified and provided declarations stating that their oral and documentary disclosures to Gale were strictly confidential.

the bar, for example, court files,[7] administrative proceedings;[8] government reports and Congressional hearings.[9]

The panel's crabbed analysis is consistent with decisions from the Second and Third Circuits holding that potential or theoretical availability to the general public is sufficient to trigger the bar, but this minority view has no support in the statute or legislative history, conflicts with the majority of decisions, and should be rejected by this Court.

The Third Circuit held in *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991), that unfiled discovery material triggered the bar. Even though the memo on which the case was based was not made public and never filed with the court following its discovery during an earlier case, the court reasoned:

> We must assume from the absence of a protective order that the information disclosed in discovery is potentially accessible to the public. . . . disclosure of discovery material to a party who is not under

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7. *See, e.g., United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) (dicta); *U.S. ex rel. McKenzie v. Bellsouth Tel., Inc.*, 123 F.3d 935, 939 (6th Cir. 1997); *Federal Recovery Servs., Inc. v. U.S.*, 72 F.3d 447, 450 (5th Cir. 1995); *U.S. ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 652-54 (D.C. Cir. 1994); *U.S. ex rel. Kreindler & Kreindler v. United Technologies*, 985 F.2d 1148, 1158 (2d Cir. 1993); *U.S. ex rel. Dick v. Long Island, Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990).

8. *See, e.g., U.S. ex rel. Grayson v. Advanced Management Technology, Inc.*, 221 F.3d 580, 582 (4th Cir. 2000); *U.S. ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513-14 (8th Cir. 1994).

9. *See, e.g., U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687-88 (D.C. Cir. 1997); *U.S. ex rel. Fine v. MK-Ferguson*, 99 F.3d 1538, 1544 (10th Cir. 1996); *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996); *U.S. ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 569-70 (10th Cir. 1995).

> any court imposed limitation as to its use is a public disclosure under the FCA.

Id. at 1158.

The Second Circuit held in *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323-24 (2d Cir. 1992), that disclosure of an investigation during service of a search warrant to "innocent" employees of a government contractor was "public" for purposes of the bar. *See also United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) ("Disclosure of information to [even a single] competent public official about an alleged false claim against the government we hold to be public disclosure within the meaning of §§ 3730(e)(4)(A) when the disclosure is made to one who has managerial responsibility for the very claims being made."); *United States ex rel. Fine v. MK-Ferguson*, 99 F.3d 1538, 1544-1545 (10th Cir. 1996) (disclosure of government audit report to state of Oregon triggered bar); *Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996) (memorandum given to a representative of the AARP, a stranger to the fraud, triggered the public disclosure bar); *United States ex rel. Foust v. Group Hospitalization and Medical Services, Inc.*, 26 F. Supp. 60, 70-72 (D.D.C. 1998) (disclosure of audit inquiry during settlement negotiations triggered public disclosure bar); *United States ex rel. Gold v. Morrison-Knudsen Co.*, 870 F. Supp. 457. 459-60 (N.D.N.Y. 1994) (memo obtained by relator from army engineer triggered bar).

Moreover, the Third, Sixth and Seventh Circuits have expanded the scope of the bar to FOIA requests, even though this fora is not listed in § 3730(e)(4)(A).[10] However, the

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10. *See, e.g., United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *United States ex rel. Mistick PBT, v. Housing Authority*, 186 F.3d 376, 383-84 (3d Cir. 1999); *United States ex rel. Haskins*, 11 F. Supp. 2d 555, 568 (D.N.J. 1998); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 979 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999).

Fourth Circuit recently held to the contrary, that FOIA disclosures did not trigger the bar because the list of fora in § 3730(e)(4)(A) was exclusive. *United States ex rel. Bondy v. Consumer Health Found.*, 2001 U.S. App. LEXIS 24238 (Nov. 9, 2001). In *United States ex rel. Pentagon Technologies Intl. v. CACI Intl.*, 1995 U.S. Dist. LEXIS 17512 (S.D.N.Y. 1995), the court also held that FOIA is not a public disclosure.

> Based upon this reasoning, Pentagen's reliance, if any, on allegations or transactions—or information without which it would not have thought of the allegations—contained within documents obtained under the FOIA does not compromise the court's jurisdiction because the documents acquired under the FOIA are not publicly disclosed within the meaning of §§ 3730(e)(4)(A).

Id. at 35-36.

The Seventh Circuit has expressly repudiated the Gale panel's holding that a private disclosure triggers the bar. *See Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608, 613 (7th Cir. 1995) (letter regarding allegations between co-defendants not a public disclosure); *United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159, 1165 (S.D. Ind. 1998) (conversations between private co-defendants not public disclosure), *dismissal aff'd on other grounds*, 189 F.3d 542 (7th Cir. 1999).

The Gale panel's analysis was also squarely rejected by the Tenth Circuit in *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996):

> We believe that in order to be publicly disclosed, the allegations or transactions upon which a qui tam suit is based must have been made known to the public through some affirmative act of disclosure. . . . As to the other purpose of the Act—encouraging the exposure of fraud—the amended

> qui tam provisions seek to ensure that information bearing on potential fraud will come to light even if government officials should decide not to initiate proceedings based on information contained in government files. The previous incarnation of the Act required dismissal of a qui tam action once it was determined that "the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. §§ 3730(b)(4) (1982) (superseded). The 1986 amendments changed the focus of the FCA's jurisdictional bar from information that the government simply had within its files to information or evidence which actually had been disclosed to the public. . . . Only when there is a positive act of disclosure to the public can the government "no longer throw a cloak of secrecy" around the allegations, for at that point the information has been "irretrievably released into the public domain." . . . [U]nder the 1986 qui tam amendments, the touchstone is actual public disclosure rather than mere knowledge of fraud. Nor do we draw any contrary conclusion from the fact that [the agency] (or the State of Oklahoma), had it been so inclined, could have beaten plaintiff to the courthouse and filed its own qui tam action on behalf of the United States.

Id. at 1519-21. *See also, e.g., United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513-14 & n.2 (8th Cir. 1994) (disclosures of allegations and transactions in corporate reports and creditors' meetings do not trigger bar).

The panel's opinion also conflicts with decisions holding that federal employees can be relators (so long as their pre-filing disclosures are voluntary). *See, e.g., United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1417 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990)

("[§ 3730(e)(4)(A)] does not prevent government employees from bringing *qui tam* actions based on information acquired during the course of their employment but not as the result of a government hearing, investigation or audit or through the news media."); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 75 (E.D. Pa. 1991); *Erickson ex rel. United States v. Am. Inst. of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989). This analysis rejects the Government's argument that a public disclosure necessarily occurs when a government employee uses information learned in his official capacity to file a qui tam action as a private relator.

D. The panel's opinion conflicts with authority from other circuits, the express language of the FCA, § 3730(d)(1), and Congressional intent, by depriving Gale of up to a 10% relator's share, if not the full 15-30% range, even though he initiated the PB investigation that led the USAO to examine PB computers manufactured for ZDS.[11] Moreover, Gale was undisputedly the

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11. The panel's opinion cites but is irreconcilable with another Ninth Circuit panel opinion. The panel in *United States ex rel. Barajas v. Northrop*, 5 F.3d 407, 411 (9th Cir. 1993), set forth the entirely sensible rule that Gale is an "original source" of allegations "if he played some part, whether direct or indirect, in the public disclosure" of the Zenith allegations. Wherever the appropriate limitation, Gale's Zenith allegations were well within the zone of permissible proximity "between [his] original disclosure to the government and the publicly disclosed information for which [Gale] now claims credit as the original source." App. A. 16a. Unlike Barajas (who had no knowledge of the defective damping fluid), Gale had firsthand knowledge of the key fraud common to both PBNEC and Zenith computers manufactured by PBNEC, the commingling with new inventory of used parts from his department's dismantling of used computers. In *Barajas*, even though Barajas was deemed an indirect original source, "[t]he government also conducted a separate and distinct criminal investigation that resulted in the criminal indictment of Northrop." *U.S. ex rel. Barajas v. Northrop*, 897 F. Supp. 1274, 1276 (C.D. Cal. 1995). Here, there was no separate and distinct investigation. Sales of used PBNEC parts to Zenith were "discovered'

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original source of the key fraud allegation in his ZDS complaint, i.e. that PB was concealing the identity of and comingling used parts in its "new" manufacturing inventory. Other circuits have held that a relator need only be an original source of some of the information on which the complaint is based. *See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 103, 107-08 (3d Cir. 2000); *United States ex rel. Fallon v. Acudyne, Corp.*, 97 F.3d 937, 941 (7th Cir. 1996); *Federal Recovery Services, Inc. v. United States*, 72 F.2d 447, 452 (5th Cir. 1995); *United States ex rel. Semtner v. Medical Consultants, Inc.*, 170 F.R.D. 490, 494 n.3 (W.D. Ok. 1997); *United States v. CAC-Ramsay*, 744 F. Supp. 1158, 1160 (S.D. Fl. 1990), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992).

Unless the panel overruled rather than "elaborat[e]" *Barajas*, the connection between Gale's disclosures and his Zenith allegations is far closer than the connection between falsified tests and defective damping fluid found acceptable in *Barajas*. Contrary to the panel's suggestion, App. A. 16a-17a, Zenith was not some separate and distinct company, but operated under an alliance agreement under which PBNEC manufactured ZDS brand computers for sale to the government. The fraud in Gale's department was the common element in the sale of both PBNEC and Zenith computers to the government. PBNEC was manufacturing "new" computers under the Zenith brand name using used parts from Gale's computer department.[12] Contrary to the *Barajas* panel's warning, that government could "limit the potential recovery of *qui tam* plaintiffs unfairly simply by

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as part of the routine investigation of Gale's PBNEC allegations. In *Barajas*, the defective damping fluid was discovered during independent tests of the gyroscopes conducted by the government. *Id.*

12. *See, e.g.*, 12/2/96 Defendants' Brief in Support of Settlement at 8:24-25 ("sales relationship between Packard Bell and ZDS under which ZDS sold PCs supplied by Packard Bell to the Government under a contract referred to as 'DTIV'").

initiating a criminal investigation," 5 F.3d at 1411, and its desire to protect and encourage relators, this panel's opinion permits the government to discourage relators much more easily than a public indictment, simply by claiming a broad investigation.

Congress authorized a reduced share, § 3730(d)(1), but did not bar jurisdiction, for relators who are an "original source" for at least some of the information. The conference report explained:

> Once the public disclosure of the information occurs through one of the methods referred to above [in § 3730(e)(4)(A)], then only a person who qualifies as an "original source" may bring the action. A person is an original source if he had some of the information related to the claim which he made available to the government or news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public so long as it is filed before an action is commenced by the Government. . . . The only exception to this minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an "original source" but where the essential elements of the case were provided to the government or news media by someone other than the qui tam plaintiff. In that case, the court may award up to 10% of the total recovery to the qui tam plaintiff.

132 Cong. Rec. H9382, H9389 (Oct. 7, 1986).[13] Thus, read

13. *See also* 132 Cong. Rec. S11238 (Aug. 11, 1986) (Sen. Grassley); *id.* at S15036 (Sept. 24, 1986) (Sen. Grassley); *id.* at S15515 (Oct. 7, 1986) (Sen. Grassley) ("In other words, a 10-percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from the original source.").

together as they must be, §§ 3730(e)(4) and 3730(d)(1) provide a sliding scale for Gale's share depending on how much of the information is credited to him as "original source," and cannot be construed to completely bar jurisdiction.

II. Resolution of the Questions is Extremely Important to the Future of the False Claims Act.

A. Giving "Public Disclosure" its Ordinary Meaning Supports the Intent of Congress.

Congress's primary intent in enacting the 1986 FCA amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), 1986 U.S.C.C.A.N. 5266, 5266. As for the *qui tam* amendments, Congress's "overall intent" was "to encourage more private enforcement suits." *Id.* at 23-24, 1986 U.S.C.C.A.N. at 5288-89. While avoiding parasitic lawsuits was clearly an additional goal, there is no indication that Congress sought to preclude the disclosure and prosecution of fraud prior to information reaching the general public.

Knowledge by the government (or a private privileged disclosure to Gale) was simply not enough to trigger the jurisdictional bar. First, Congress expressly repudiated the "government knowledge" defense. Second, Congress believed that it was essential for allegations of fraud, and the underlying information, to reach the public domain for reasons of accountability and to act as a check on governmental inaction or under-enforcement.[14] Congress sought to supplement

14. 132 Cong. Rec. H9382, H9389 (conference report) ("The law that we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government. . . . Another reason for providing for this full party status is to keep pressure on the Government to pursue (Cont'd)

government enforcement with private resources and envisioned a cooperative working relationship.[15] See Gary W. Thompson, A Critical Analysis of Restrictive Interpretations Under the False Claim Act's Public Disclosure Bar, 27 Pub. Cont. L.J. 669, 693 (1998).

The House (Berman) and Senate (Grassley) sponsors recently wrote to Attorney General Reno criticizing restrictive and anti-relator judicial and DOJ constructions of the "public disclosure" and "original source" provisions. They explained, for example, that "by public disclosure, we meant disclosure to the public at large, not just one member of the public and certainly not to a confidential counselor." Congress was concerned with whether the government's information "was sufficiently publicized so that the federal government would be forced to act or explain why it chose not to act." 145 Cong. Rec. E1546 (July 14, 1999).

B. The Panel's Construction of "Public Disclosure" Frustrates the Intent of Congress.

The panel's construction of "public disclosure" undermines Congressional intent by substantially re-enacting the "government knowledge" defense,[16] by discouraging cooperation, and by creating uncertainty and confusion among

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the case in a diligent fashion. Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain.").

15. S. Rep. No. 345, 99th Cong., 2d Sess. 4, 1986 U.S.C.C.A.N., 5269; 132 Cong. Rec. H9382, H9389 (conference report).

16. As the D.C. Circuit remarked, "when Congress amended the Act in 1986, . . . the focus of the jurisdictional bar [changed] from evidence of fraud inside the government's overcrowded file cabinets to *fraud already exposed in the public domain*." *U.S. ex rel. Findley v. FPC Boron Employees' Club*, 105 F.3d 675, 684 (D.C. Cir. 1997).

relators generally. It is axiomatic that relators will be discouraged from conduct which could trigger a very broad jurisdictional bar, e.g., voluntary disclosures and cooperation in nonpublic investigations. An inadvertent word or question, or the review of even a single "internal" document might suddenly thwart years of relator and attorney time, resources, and effort in investigating and preparing a case. Government agencies could selectively bar relators by simply announcing, privately, an investigation. This would render the "voluntary" disclosure requirement in 3730(e)(4)(B) a potentially deadly and precarious trap for the unsuspecting relator, drastically limiting the class of potential relators to only "original sources."

The government is, in theory, investigating everything. The Gale panel has enacted a wide-open "government investigation" defense, one sought by DOJ in 1992 but rejected by Congress in 1993.[17] Under the panel's construction, there are no bounds as to when an investigation begins and ends, and virtually no limits on documentary and oral contact with the "outside" that could trigger the bar. The advantage of the reasonably precise and objective "public domain" standard is that it is capable of a reasonable degree of retrospective precision. The dates of hearings, filings, reports, and news articles can be determined, years later if need be, with precision. In contrast, the dates of public disclosures allowed by the panel are vague, imprecise, undocumented, and subject to great uncertainty. This case graphically illustrates the problem. Neither the district court, nor the panel, nor ZDS, nor the USAO were able to cite the date and content of oral or documentary disclosures that triggered the bar.

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17. April 1, 1992, Statement of Stuart M. Gerson to House Judiciary Comm., Subcomm. on Civil and Constitutional Rights. The False Claims Amendments Act of 1992 included a jurisdictional bar for ongoing government investigations, but it was never enacted. S. 841, 103d Cong. (1993); § 3(b), H.R. 4563, H.R. Rep. No. 102-837.

The panel's widening of the bar improperly precludes a *qui tam* action anytime the Government made a private and privileged disclosure of the mere existence of an investigation to a cooperating relator. The subversion of the purpose of the FCA by such a tortured construction is especially apparent in this case. Despite proof of both liability and damages, and the inclusion of some ZDS contracts in the original $3.5 million settlement agreement, the USAO has now decided that ZDS is no longer a target. But for this case, therefore, the Government will get nothing from ZDS.

III. The Opinion Conflicts With the Analytical Framework Set Forth by this Court in *Marcus v. Hess*.

The Court has previously rejected the panel's reliance on policy considerations to reject a bona fide relator. The Government argued in *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47 (1943), that a relator should not be allowed to base his qui tam complaint on allegations contained in a public criminal indictment. The Court refused to sanction a revision contrary to clear Congressional intent:

> The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are

> addressed to the wrong forum. Conditions may have changed, but the statute has not.

Id. at 546-47. *See Dunn v. CTFC*, 519 U.S. 465 (1997) (plain statutory language trumps policy considerations). By ignoring the plain language of the statute and interjecting improper policy considerations and speculation, App. 10a-11a, the panel improperly departed from this analytical framework. For example, the panel, relying on "one of the policy goals" behind the 1986 amendments, and speculating that the exclusive list of three public disclosure fora in § 3730(e)(4)(A) was "somewhat ambiguous," because it supposedly produces an "absurd result," the panel expanded the expressly limited bar to cover "any kind of government investigation" or "any other kind." Such a statutory rewrite is analytically improper under the objective "plain meaning" standard employed by the Court. First, nothing is "ambiguous" about the exclusive listing of public disclosure fora. Second, Congress would have introduced the list in § 3730(e)(4)(A) with "for example" if it had intended "any kind" of Government investigation.[18] Third, the Government didn't learn about ZDS fraud from its "own" investigation, but from a logical outgrowth of the statutory investigation of the PBNEC fraud initiated by Gale's complaint. Finally, the "policy" analysis simply ignored the provision of the FCA, § 3730(d)(1), allowing Gale to remain a relator (assuming, *arguendo*, a qualifying public disclosure) so long he possessed some "original source" information (here the PBNEC comingling of used with new parts ultimately assembled into ZDS computers).

The panel's next policy-driven detour (App. A. 14a) was to rely on Congress' supposed intent to ban "free riders" on Government information to conclude that the USAO disclosures to Gale were "public" to trigger the bar, but only as to him.

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18. If "any kind" of Government investigation could bar a relator's action, then the Government would not be required to file suit as provided in § 3730(b)(3).

This analysis turns the 1986 repudiation of the "government knowledge" defense on its head.[19] Congress rewrote the bar to focus on what the public–not the Government–knows, and it is undisputed that the "public" knew nothing of the ZDS fraud. Virtually every relator uses some information ultimately gleaned from Government files. Congress triggered the bar only by disclosures to the general public, i.e. it is the method and scope of the disclosure that matters, not the presence of information in the minds of AUSAs and in their files. Finally, even if a public disclosure occurred, for example, if the USAO announced the ZDS investigation in a press release, Gale's "original source" status is preserved because the statute asks what Gale provided the Government (PBNEC's comingling of used with new parts) rather than what the Government provided him (expanding the PBNEC investigation to include ZDS computers manufactured by PBNEC).

The panel's final departure from the statute was its invention of a "new entity" limitation on Gale's "original source" status. App. A. 16a-17a. The FCA contains no such restriction, and the panel ignores the provision in § 3730(A) that Gale need only be "an" original source, thus contemplating that there may be other sources of information (e.g., Compaq). Gale was "an" original source for the PBNEC "used parts" scheme, a core and essential element of the ZDS complaint, his use of some arguably publicly disclosed information cannot defeat jurisdiction (although it may affect share) whether the existing PBNEC complaint had been simply amended to add it's sister company, ZDS, or whether, as here, Gale filed a new complaint for sound tactical and strategic reasons.

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19. The panel's construction would make the "government knowledge" defense to certain actions barred under § 3730(e)(2) surpuflous.

CONCLUSION

This petition for a writ of certiorari should be granted for the reasons set forth above.

Respectfully submitted,

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